IBRAHIM MOHIDEEN KUTTY

v.

TIMBALAN MENTERI DALAM NEGERI & ORS

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[ORIGINATING SUMMONS NO: MT2-24-98-2002]
11 MARCH 2003

LIMITATION: *Striking out action on ground of time bar - Plaintiff's action commenced 44 months after detention order imposed upon plaintiff - Whether application filed after limitation period of 36 months prescribed in s. 2(a) of Public Authorities Protection Act 1948 - Whether application statute-barred - Public Authorities Protection Act 1948, s. 2(a)*

CIVIL PROCEDURE: *Striking out - Grounds for - Limitation - Whether application ought to be struck out because time-barred - Whether application frivolous or vexatious - Whether an abuse of process of court - Rules of the High Court 1980, O. 18 r. 19(1)(b), (d)*

This was an application by the first defendant pursuant to O. 18 r. 19(1)(b) or (d) of the Rules of the High Court 1980 ('RHC') for an order that the plaintiff's originating summons filed on 14 March 2002 against the first defendant be struck out on the ground that the plaintiff's action against the first defendant was time-barred. The first defendant contended that the plaintiff's action commenced 44 months after the detention order under s. 8(1) of the Internal Security Act 1960 had been imposed upon the plaintiff on 7 July 1998 and that it was filed after the limitation period of 36 months prescribed in s. 2(a) of the Public Authorities Protection Act 1948 ('the Act'). The question requiring determination was whether the plaintiff's originating summons dated 14 March 2002 was, having regard to the limitation period of 36 months prescribed under either the first or second limb of s. 2(a) of the Act, statute-barred.

Held:

[1] The first limb of s. 2(a) of the Act had no application to the facts of the instant case as the detention order was far from being a single act *per se*. The limitation period of 36 months under the second limb of s. 2(a) of the Act began to run from the date the injury or damage ceased *ie*, the date on which the plaintiff was released which was 3 January 2000, and he was at liberty to file his suit or action against the first defendant within 36 months thereof, *ie*, on or before 3 January 2003. Since this originating

summons was instituted against the first defendant on 14 March 2002, *ie*, some 26 months after the cessation of the injury or damage, it was well within the 36-month limitation period prescribed under the second limb of s. 2(a) of the Act, in which case it was neither frivolous nor vexatious under O. 18 r. 19(1)(b) of the RHC, nor was it otherwise an abuse of the process of the court under O. 18 r. 19(1)(d) of the RHC thereof. (pp. 150 f & 151 a)

[Application dismissed.]

Case(s) referred to:

Ahmad Tajudin Hj Ishak v. Suruhanjaya Pelabuhan Pulau Pinang [1997] 2 CLJ 225 CA ***(refd)***

Alias Ismail v. Hairuddin Mohamad & Anor [1997] 4 CLJ 669 CA ***(dist)***

Baltim Timber Sdn Bhd v. Director of Forests & Ors [1996] 4 MLJ 103 HC ***(dist)***

Credit Corporation (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC ***(dist)***

Mak Koon Yong & Anor v. Municipal Councillors, Malacca [1967] 1 MLJ 256 HC ***(refd)***

Selvaraju Ponniah v Suruhanjaya Perkhidmatan Awam, Malaysia & Anor [1999] 5 MLJ 678 HC ***(refd)***

Sr Katherine Lim KH v. Ketua Pengarah Perkhidmatan Perubatan Malaysia & Ors [1997] 2 MLJ 538 CA ***(dist)***

Legislation referred to:

Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 4(1)

Internal Security Act 1960, s. 8(1).

Public Authorities Protection Act 1948, s. 2(a)

Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980, GO. 34(2)

Rules of the High Court 1980, O. 18 r. 19(1)(b), (d)

For the 1st defendant - Mahamad Naser Disa SFC; AG's Chambers
For the plaintiff - J Amardas; M/s KP Ng & Amardas

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing J:

Application

This is an application by the first defendant in encl. (8) pursuant to O. 18 r. 19(1)(b) or (d) of the Rules of the High Court 1980 for an order that the plaintiff's originating summons in encl. (1) filed on 14 March 2002 against, *inter alia*, the first defendant be struck out on the ground that the plaintiff's

action against the first defendant is time-barred in that it was commenced 44 months after the detention order under s. 8(1) of the Internal Security Act 1960 has been imposed on him on 7 July 1998 and that it was filed after the limitation period of 36 months prescribed in s. 2(a) of the Public Authorities Protection Act 1948 ("s. 2(a)").

Submission For First Defendant

Mahamad Naser bin Disa, learned senior federal counsel, submitted for the first defendant that the prayers in the plaintiff's originating summons include, *inter alia*, two declaratory orders *viz* that the detention order dated 7 July 1998 issued by the first defendant was not valid; and that the second defendant's decision on 11 September 2000 to dismiss the plaintiff was also not valid.

He added that pursuant to s. 2(a), the plaintiff should have commenced this suit or action against the first defendant within 36 months next after the act complained of ie, the detention order dated 7 July 1998 under the first limb of s. 2(a).

He also submitted that since the act complained of is the issue of the detention order on 7 July 1998, the period of 36 months would begin from that date and would expire on 7 July 2001, the detention order being a single act.

His submission is largely confined to the first limb of s. 2(a) and not the second limb thereof.

Contention For Plaintiff

J Amardas, learned counsel for the plaintiff, narrated that while the detention order was issued on 7 July 1998, the plaintiff was released on 3 January 2000 and that after the detention order, on 29 September 1998 the plaintiff received a letter of suspension from service without pay from 8 July 1998, and that the plaintiff received the decision of the second defendant that the plaintiff was dismissed from service with effect from 16 June 2000.

It was submitted for the plaintiff that there must be a complete cause of action before that cause of action could be filed and that time only began to run after a cause of action was complete ie, on 11 September 2000 when the plaintiff was informed of the said decision of dismissal, and not from the date of issue of the detention order on 7 July 1998.

He added that it was the detention order which resulted in the plaintiff's dismissal and that the plaintiff had to wait for the decision of the second defendant before he could institute this action, and that the detention order continued until he was released on 3 January 2000.

The thrust of his submission is primarily focused on the second limb of s. 2(a).

Decision Of The Court

1. Question For Determination

The question for determination by this court is whether the plaintiff in commencing this originating summons on 14 March 2002 against the first defendant to challenge the validity of the detention order issued by the first defendant against the plaintiff on 7 July 1998 is statute-barred, having regard to the limitation period of 36 months prescribed under either the first limb or the second limb of s. 2(a).

2. Ambit Of Section 2(a)

The entire application of the first defendant and the submissions by learned counsel for both the first defendant and the plaintiff gravitate solely towards the interpretation to be placed on the provisions of s. 2(a). The full impact of s. 2(a) may be put in proper perspective by reproducing *in extenso* the provisions thereof as follows:

> **Protection of persons acting in execution of statutory or other public duty**
>
> 2. Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect:
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;

The limitation period under s. 2(a) as alluded to above has been specified in two separate limbs.

The first limb disallows the commencement of eg, any suit or action in the Federation against any person for any act done in pursuance of any execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority unless it is commenced within thirty-six months next after the act, neglect or default complained of.

In my considered view, "the act, neglect or default complained of contained in the first limb of s. 2(a) is confined to a single act, neglect or default which does not involve an element of continuance thereof and the single act *per se* is capable of constituting a complete cause of action ie, "where there is in existence a person who can sue and another who can be sued and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed": per Hashim Yeop A Sani CJ (Malaya) in *Credit Corporation (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 (SC).

An illustration of the application of the first limb of s. 2(a) may be found in *Sr Katherine Lim KH v. Ketua Pengarah Perkhidmatan Perubatan Malaysia & Ors* [1997] 2 CLJ 564 (CA), where the appellant Sr Katherine, an employee of the first respondent ie, the Ministry of Health Malaysia, filed an originating summons dated 7 November 1996, praying, *inter alia*, for a declaration that the respondents' decision purporting to dismiss her from her post as a nursing sister was null and void. The appellant maintained that she was away in Australia from March 1988 to 1991 doing her Master's degree. On 7 July 1988, the respondent published a notice in the government gazette asking the appellant to report for duty within seven days as she had left her duties without leave or without any other reasonable cause, failing which she would be deemed to have been dismissed from service.

The first respondent's preliminary objection that the action was time-barred in view of the first limb of s. 2(a) which provides that the action must be commenced "within 36 months next after the act, neglect or default complained of ..." and that limitation ran from the date of the government gazette was upheld by the Court of Appeal, as the appellant was clearly out of time by five years and four months. In my view, the Court of Appeal judgment was concerned with the single act of the publication of the government gazette in which event, the first limb of s. 2(a) applied.

In *Alias bin Ismail v. Hairuddin bin Mohamad & Anor* [1997] 4 CLJ 669 (CA), the appellant brought an action against the government in 1996 in which the pleading suggested causes of action for malicious prosecution and defamation arising out of a theft charge against the plaintiff appellant on 27 October 1987. The defendant respondents alleged that the plaintiff's claim was filed out of time under s. 2(a) in that such action must be brought within three years next after the act complained of ie, 27 October 1990. The High Court and the Court of Appeal concurrently held that the court has no discretion to set aside a defence of limitation. It must be observed that the facts of that case demonstrated that it was a single act ie, the theft charge in court, in which case the first limb of s. 2(a) applied.

Baltim Timber Sdn Bhd v. Director of Forests & Ors [1996] 4 MLJ 103 (HC) was a case in which the plaintiff's claim was filed on 9 March 1997 against a public authority in respect of a single act ie, the revocation of a forest timber licence on 11 March 1987 which resulted in the court holding that it was barred by the 36-month limitation period as specified in the first limb of s. 2(a).

The aforesaid authorities relied on by the first defendant are in my view of no assistance to the contention advanced for the first defendant as on the facts they were concerned with a single act in each case.

In *Mak Koon Yong & Anor v. Municipal Councillors, Malacca* [1967] 1 MLJ 256 (HC), one of the issues of law for determination was whether the plaintiff in commencing an action on 27 April 1963 for a declaration, that the defendants' disapproval of amended plan No. 9322 to pass plan No. 8720 was wrongful and *ultra vires*, was barred by limitation under s. 2(a). For the defendant, it was submitted that the time began to run from 23 December 1961 the day on which plaintiff's architect was informed by the municipal engineer that the amended plan No. 9322 would not be approved. The plaintiffs' contention was that the time began to run only from 27 June 1962 when the municipal engineer approved the amended plan. On this issue, it was held by Wan Suleiman J (later SCJ) that the plaintiff's action was not time-barred if the refusal to approve the amended plan was actionable, ... there had indeed been a continuation of the act, and that therefore the plaintiff's were correct in saying that the act causing damage ceased only from 27 June 1962 thereby invoking the second limb of s. 2(a). His Lordship, however, added that the fact that the suit is not time-barred cannot affect the outcome ie, the plaintiff's action was dismissed with costs as there was no cause of action. In my view, this authority which was cited for the first defendant does not seem to assist the first defendant in any way.

One of the issues in the Court of Appeal judgment in *Ahmad Tajudin bin Hj Ishak v. Suruhanjaya Pelabuhan Pulau Pinang* [1997] 2 CLJ 225 also concerned the period of limitation under the second limb of s. 2(a) as the act, neglect or default complained of was of a continuing nature and would in my view render considerable support to the plaintiff's contention.

In *Selvaraju a/l Ponniah v. Suruhanjaya Perkhidmatan Awam, Malaysia & Anor* [1999] 5 MLJ 678, the facts revealed that the plaintiff, a government driver, was detained on 5 August 1991 under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 and suspended from his duties pursuant to GO. 34(2) of the Public Officers (Conduct and Discipline) (Cap D) General Orders 1980. By a letter dated 16 July 1992, the plaintiff was dismissed from service with effect from 6 July 1992. By a letter dated

26 July 1992, the plaintiff appealed to the Lembaga Rayuan Tatatertib (the Disciplinary Appeal Board). By a letter dated 26 November 1992, the plaintiff was informed that on 19 October 1992, his appeal was dismissed. The plaintiff contended, *inter alia*, that the detention order, upon which the suspension order was based, was illegal and unlawful. The defendants argued, *inter alia*, that the plaintiff's claim was caught by time bar pursuant to the first limb of s. 2(a) ie, the action must be commenced "within 36 months next after the act, neglect or default complained of" and this argument was upheld by Kamalanathan Ratnam J. There was no submission on the second limb of s. 2(a) and so no judicial deliberation and determination thereon. That being the case, I am unable to see any support to be derived therefrom as being in favour of the first defendant's contention.

In the case of a continuance of injury or damage, in the form of or by way of deprivation of fundamental liberty brought about by a detention order in the instant case which was stated to be for a duration of two years ie, from 8 July 1998 to 8 July 2000, the second limb of s. 2(a) would apply, so that for the purposes of imposing the period of limitation, time begins to run when the injury or damage ceases when the detention order expired on 8 July 2000 or more specifically in the instant case when the plaintiff was released on 3 January 2000.

In my judgment, the first limb of s. 2(a) has no application to the facts of the instant case as the detention order was far from being a single act *per se* but, as alluded to above, was stated to be for a duration of two years. It is open to the plaintiff to seek reliance on the second limb of s. 2(a) which is couched in such a manner as to provide for the continuance of injury or damage by way of natural progression or effluxion of time, so that the remedy, if any, for any alleged injury or damage would be available and reckonable from the date of the cessation thereof.

In the circumstances, I hold that the limitation period of 36 months under the second limb of s. 2(a) began to run from the date the injury or damage ceased ie, the date on which the plaintiff was released on 3 January 2000 and he is at liberty to file his suit or action against the first defendant within 36 months thereof ie, on or before 3 January 2003. Since this originating summons was instituted against the first defendant on 14 March 2002, ie, some 26 months next after the cessation of the injury or damage, it is well within the 36 months limitation period prescribed in the second limb of s. 2(a), in which case it is neither scandalous, frivolous or vexatious under O. 18 r. 19(1)(b) of the Rules of the High Court 1980 nor is it otherwise an abuse of the process of the court under O. 18 r. 19(1)(d) thereof.

Conclusion

In the light of the foregoing grounds, I hold that the first defendant's application in encl. (8) is without merits and is hereby dismissed with costs, to be taxed only after encl. (1) has been heard and disposed of on its merits.